Supreme Court, U. S.
FILED
FEB 2 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1972

NO. 72-1040

COMMUNIST PARTY OF INDIANA, GUS HALL, JARVIS TYNER, SIMON BOORDA, JESSE REECE, MIKE BAYER, and RUTH NORRICK, Individually and on behalf of all other qualified voters similarly situated,

Appellants,

vs.

EDGAR D. WHITCOMB, Individually and as Governor of the State of Indiana; KARL J. STIPHER and THURMAN DE MOSS, Individually and as members of the Indiana State Election Board; and INDIANA STATE ELECTION BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION

PETITION FOR REHEARING

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The appellees, by counsel, respectfully petition this Court to grant a rehearing in this cause and reconsider its opinion therein of January 9, 1974.

As a result of the opinion of the Court, appellees (hereafter, the State) are unable to determine what loyalty oath, if any, may be required of a group seeking

certification as a political party under Indiana law or under what circumstances, if any, such a loyalty oath may be required. It is respectfully submitted that the opinion of the Court in this case, when considered together with prior decisions of this Court, has created confusion and uncertainty in the law.

In the past, this Court had treated in separate lines of authority those loyalty oath cases involving "advocacy oaths" and those involving "support oaths." See, e.g. *Keyishian v. Board of Regents,* 385 U.S. 589 (1967) and *Law Students Civil Rights Research Council, Inc. v. Wadmond,* 401 U.S. 154 at 161-164 (1971). The case of *Cole v. Richardson,* 405 U.S. 676 (1972), however, showed that distinction to be artificial. A loyalty oath requiring opposition to the unlawful overthrow of government was considered to be merely the converse of a support oath, as it certainly is. Yet such an oath is equally clearly the converse of an advocacy oath.

The State attempted in this appeal to obtain a clarification of whether these two types of oath were now to be considered one. The opinion of the Court in this case did not provide that clarification; rather, it merged two other lines of case authority, distinguishing criminal and civil cases. Here a clearly civil case, involving access to the ballot, was decided as if it were a criminal case. Such a decision is contrary to the prior rule of this Court as set out in *Communist Party v. Control Board,* 367 U.S. 1 at 56 (1961).

Thus, in this case there are four separate lines of authority converging at one point and creating new and undetermined interrelationships. If the criminal law standard is now to apply to support oaths, as appears

likely to the State, then it would be doubtful if any loyalty oath statute could ever be constitutional. As an extreme case, it would then appear that the oath set out for the office of President of the United States by Article 2, § 1 (8) of the United States Constitution could be required only if the text of the inaugural address "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Slip opinion, p. 7, citing *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

It is not believed by the State that any such result was actually intended. The uncertainty caused by the opinion of the Court in this case, however, necessarily results in such speculation.

The State would further submit that the concurring opinion of Mr. Justice Powell in this case would appear to rest upon an interpretation of an Indiana law which has not been previously construed, was not in issue below and would, in all probability, be construed differently by the courts of the State of Indiana. The State submits that there was no improper discrimination in the case.

The relevant provisions of Indiana Code of 1971, 3-1-11-12 are as follows:

> "*Any political party* or organization which is in existence at the time of the passage of this act [1945], or which shall have had a ticket on the ballot one or more times prior to any election, and which does not advocate any of the doctrines the advocacy of which is prohibited by this act, *shall insert a plank in its platform that it does not advocate any of the doctrines prohibited by this act.* No existing or newly-organized political party or organization shall be permitted on or have the names of its candidates printed on the ballot used at any election until it has filed an affidavit, by its officers, under

> **oath, that it does not advocate the overthrow of local, state or national government by force or violence . . .'' (emphasis added)**

Following the interpretation of this statute generally accepted by all the concerned parties, the Republican Party and the Democratic Party inserted the appropriate plank in their platforms, but did not file an affidavit. Each of these parties had polled more than ten percent of the vote in the last preceding general election. Therefore, they were entitled to a place on the ballot without qualifying anew. I.C. 1971, 3-1-11-1. They were also subject to the primary election and state convention provisions discussed below.

Four other parties appeared on the 1972 ballot, each by the petition provisions of I.C. 1971, 3-1-11-1. These parties did not qualify for inclusion on the ballot by reason of prior election results. The Socialist Labor Party and the Socialist Workers Party filed in a timely manner the required petitions and affidavit. The Indiana Peace and Freedom Party and the American Independent Party initially filed faulty affidavits, but were allowed to file proper affidavits as a result of the litigation in the District Court.

The Communist Party, appellant herein, initially attempted to file its petitions without any affidavit. After the litigation in the District Court, they attempted to file a modified affidavit which was held by the Election Board and the District Court not to comply with the statutory requirements still in effect at that time.

The concurring justices consider the affidavit requirement to apply to parties using the primary election and convention processes. IC 1971, 3-1-9-1. While such an interpretation might seem likely to one not familiar with

Indiana election laws, that law in its entirety shows the contrary to be true.

I.C. 1971, 3-1-9-1 provides that the procedure set out in 3-1-9-1 through 3-1-10-5 is mandatory for parties having polled more than ten percent of the vote in the last preceding general election. Under this procedure, a party primary is held at which candidates for certain offices, precinct committeemen of the party and delegates to the state convention are selected. I.C. 1971, 3-1-9-4. Within sixty days thereafter, that party must hold a state convention 3-1-10-1. That convention nominates candidates for state-wide offices. "Such convention shall also formulate its party platform." I.C. 1971, 3-1-10-3.

That platform then becomes the official guide of the positions of the party. Such status is given by the fact that it is the agreed statement of the official delegates of the party as selected by the rank and file voters of the party in an open party primary.

Were the officers of the party to be required to file an affidavit as to the position of the party, those officers would necessarily be bound by the provisions of the platform, so that the affidavit would be pure surplusage. The only possible effect of such a requirement would be to eliminate a party from the ballot for a technical error in following the procedure to be set down. [The Supreme Court of Indiana has ruled that any affidavit filed must comply strictly with the statutory language. *State ex rel Socialist Labor Party v. State Election Board,* 251 Ind. 260 (1968)]. Such a result would be totally absurd since, again, that affidavit would be only a secondary authority of the position of the party.

Other parties, including those which had not presented candidates in the last preceding general election or had

received less than ten percent of the total vote in that election, must follow a different procedure. There is no provision of law authorizing such parties to participate in a primary election nor to hold a state convention. Such parties are left to their own devices by Indiana law. As a practical matter, such organizations are usually led by a fairly small group of persons, choosing their officers and candidates in an informal caucus. For such a party, the affidavit of the party officers is a practical and necessary device for determining the positions held by the party.

It is respectfully submitted that the concurring justices erred in assuming that differences in treatment constituted discriminatory treatment. Rather, that difference represents a difference in the underlying facts. Were the parties holding conventions to be required to file an affidavit in addition, then there would be discrimination.

It thus appears that the two sentences from I.C. 1971, 3-1-11-12, quoted above are alternative rather than cumulative requirements. Any other interpretation would be unreasonable, and Indiana law recognizes that:

> "In construing this or any other statute, this court shall endeavor to do so within the context of logic and reason. As we have stated on past occasions: 'It is presumed that the Legislature does not intend an absurdity, and such a result will be avoided if the terms of the act admit of it by a reasonable construction.' " *In re Estate of Pickens v. Pickens,* 255 Ind. 119 at 128 (1970).

It should further be noted that the interpretation of the requirements of 3-1-11-12 as in the alternative has been consistently followed by the Indiana Election Board and the various political parties, in which members of the Legislature play leading roles, for nearly thirty years.

Indiana law further provides that when an administrative or executive interpretation is placed on a statute which is acquiesced in by those concerned, that interpretation will not be disturbed. *State Board of Tax Commissioners v. Wright,* 139 Ind. App. 370 (1966); *Baker v. Compton,* 247 Ind. 39 (1965).

It is therefore submitted that the concurring justices misconstrued provisions of Indiana law and that a decision on the merits by those justices would be proper.

CONCLUSION

For the foregoing reasons, the State respectfully urges this Court to grant a rehearing and reconsider its opinion entered herein on January 9, 1974.

Respectfully submitted,

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/s/ DARREL K. DIAMOND

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CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

/s/ THEODORE L. SENDAK

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